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NO. 92-857

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

CARVEL GORDON DILLARD,
Petitioner,

v.

SECURITY PACIFIC CORPORATION, ET AL.,
Respondents

Petition for Writ of Certiorari to
The United States Court of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following restates the questions listed by petitioner Carvel Dillard that pertain to respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.:

1. Whether a party opposing arbitration establishes a right to a jury trial under section 4 of the Arbitration Act based upon conclusory allegations unsupported by any affidavit or other evidence. (Restatement of Petitioner's Questions 1 and 2.)

2. Whether a party is entitled to declaratory and permanent injunctive relief when he has not made a claim for such relief in his complaint. (Restatement of Petitioner's Question 3.)

3. Whether findings of fact and conclusions of law are required under circumstances not covered by FED. R. CIV. P. 52(a). (Restatement of Petitioner's Question 4.)

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STATUTES INVOLVED

The statute primarily involved in this case is section four of the Federal Arbitration Act, 9 U.S.C. § 4 (1988), which provides as follows:

> § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order

to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may

> specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT OF THE CASE[1]

The Fifth Circuit decision from which petitioner Carvel Dillard ("Dillard") seeks relief is in a consolidated appeal in three separate suits brought by Dillard--Cause No. H-85-4135 (the "1985 Case"), Cause No. H-86-3251 (the "1986 Case"), and Cause No. H-88-2848 (the "1988 Case"). Respondent Merrill Lynch, Pierce, Fenner & Smith, Incorporated[2] ("Merrill Lynch") was a party only to the 1985 Case and the 1988 Case. Accordingly, Merrill Lynch will not address the issues Dillard purports to raise with respect to the 1986 Case.

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[1] To the extent Dillard contends that any facts were established in the underlying proceedings, he is incorrect. Moreover, the Fifth Circuit's description of the proceedings in this matter are sufficient and correct, and respondent takes issue with the many statements by Dillard in his petition that contradict or go beyond the Fifth Circuit's description.

[2] Respondent Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a subsidiary of Merrill Lynch & Co., a publicly traded corporation. Merrill Lynch, Pierce, Fenner & Smith, Incorporated has the following subsidiaries that are not wholly owned: Merrill Lynch Life Agency Inc. (Ohio), Merrill Lynch Life Agency Inc. (Oklahoma), Merrill Lynch Life Agency Ltd. (Mississippi), Merrill Lynch-Nomura Management Company, Inc., ML Life Agency, Inc., Wagner Stott Clearing Corp.

A. The 1985 Case

Dillard filed the 1985 case against Merrill Lynch claiming that Merrill Lynch had somehow acted improperly in liquidating a securities trading account Dillard held at Merrill Lynch. Based on arbitration clauses in Dillard's customer agreements with Merrill Lynch, Merrill Lynch moved to compel arbitration of Dillard's claims.

Dillard opposed the motion to compel arbitration and filed his own motion seeking a declaration that the arbitration clauses at issue were invalid adhesion contracts and seeking a permanent injunction against Merrill Lynch's enforcement of the clauses. In his motion, Dillard argued that the clauses were included in Merrill Lynch's customer agreements pursuant to an antitrust conspiracy with other securities brokers. Dillard also requested a jury trial under section 4 of the Federal Arbitration Act on the enforceability of the arbitration contracts; however, he did not submit any affidavits or any other evidence in support of his opposition to arbitration.

Concluding that "[n]o claim has been made in plaintiff's Complaint or First Amended Complaint that creates any question of law, equity or fact that cannot be arbitrated," the trial court granted Merrill Lynch's motion to compel arbitration. (Petitioner's Appendix ["App."] at 89.) In addition, the trial court denied Dillard's request for declaratory and permanent injunctive relief because the motion was "beyond the scope of [Dillard's] pleadings." (App. at 89.) The court then dismissed the case without prejudice. (App. at 90.)

A January 4, 1991, arbitration resulted in a take-nothing award against Dillard.

The Fifth Circuit affirmed the trial court's orders. The Fifth Circuit held that Dillard was required to show that his allegations, if true, were legally sufficient to relieve him of his obligation to submit to arbitration and to produce at least some evidence to substantiate those factual allegations. (App. at 20.) The court concluded that Dillard had not satisfied this burden because, *inter alia*, Dillard failed to adduce any evidence that the contract was somehow unfair or oppressive in this case. (App. at 22.)

In addition, the Fifth Circuit held that Dillard could not obtain declaratory or permanent injunctive relief without making the request in his pleadings in accordance with Fed. R. Civ. P. 8(a). (App. at 25.) Moreover, the Fifth Circuit concluded that the trial court's refusal to enter finding of fact and conclusions of law was not error as neither of the circumstances in which such findings are made under Fed. R. Civ. P. 52(a) was present: a trial upon the facts without a jury or a ruling on an interlocutory, as opposed to permanent, injunction. (App. at 25.)

B. The 1988 Case

Dillard sued all respondents, including Merrill Lynch, in the 1988 case. Dillard alleged antitrust violations against Merrill Lynch, Security Pacific Corp. ("Security Pacific"), and Securities Industry Association, Inc. He also asserted RICO, Hobbs Act, and common law claims against Merrill Lynch, Security Pacific, and Jenkens & Gilchrist. Finally, Dillard asserted claims against Merrill Lynch based on the same securities transactions at issue in the 1985 Case.

The district court abated Dillard's claims against Merrill Lynch in the 1988 Case until such time as Dillard attempted and failed to add those claims to the 1985 Case by amending his complaint in that case.

(App. at 311.) The Fifth Circuit concluded that various efforts by Dillard to amend the judgment in the 1985 Case and to add Merrill Lynch to the 1986 case were sufficient to satisfy the terms of the abatement. (App. at 44.) As the result, the Fifth Circuit remanded the 1988 Case as to Merrill Lynch for prosecution on the merits.

REASONS FOR DENYING THE WRIT

None of the questions Dillard raises in his petition merit the Court's review. Dillard does not suggest any conflict between the principles applied by the Fifth Circuit and any decision of the Court or any of the circuits. *See* Sup. Ct. Rule 10.1. Moreover, the Fifth Circuit's decision is correct.

First, the Fifth Circuit properly concluded that Dillard was not entitled to a jury trial on the enforceability of the arbitration clauses. Although section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides for a jury trial on the enforceability of any agreement to arbitrate, the party opposing arbitration is not entitled to a jury trial simply by demanding one. *Saturday Evening Post Co. v. Rumbleseat Press*, 816 F.2d 1191, 1196 (7th Cir. 1987). The enforceability of the agreement must "be in issue." 9 U.S.C. § 4. To put enforceability in issue, the Fifth Circuit held that Dillard "must make some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations proved to be true. In addition, he must produce at least some evidence to substantiate his factual allegations." (App. at 19-21.)

The Fifth Circuit was correct in requiring Dillard to satisfy this burden in order to obtain a jury trial under section 4. The burden imposed by the Fifth Circuit is consistent with other decisions touching on the issue. *See, e.g., Chastain v. Robinson-Humphrey Co.*, 957 F.2d

851, 855 (11th Cir. 1992) ("party must substantiate the denial of the contract to arbitrate with enough evidence to make the denial colorable"); *T & R Enters. v. Continental Grain Co.*, 613 F.2d 1272, 1278 (5th Cir. 1980) (requiring some evidence to substantiate denial that arbitration agreement had been made); *Almacenes Fernandez, S.A. v. Golodetz*, 148 F.2d 625, 628 (2d Cir. 1945) ("[t]o make a genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made was needed, and some evidence should have been produced to substantiate the denial").

The burden imposed under these authorities promotes important objectives of the Federal Arbitration Act. "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration. . . ." H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (quoted in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)). These objectives will be thwarted if the costs and delays associated with a jury trial on collateral issues can be imposed on the arbitration process with the kind of general and conclusory allegations, unsupported by affidavits or other evidence, that Dillard made in this case. Such a disruption of the arbitration process should be permitted only when the opposing party can point to specific facts that would defeat arbitration and supports those facts with some evidence.

Moreover, Dillard's argument that arbitration agreements such as the ones at issue are contracts of adhesion has been rejected consistently by the courts. Adhesive contractual terms are not void per se. Rather, the party attacking them must show that they are unconscionable. *See* 6A Arthur L. Corbin, CORBIN ON CONTRACTS § 1376 at 20-21

(1962). In essence, allegedly adhesive arbitration clauses are subject to the same attacks as any other arbitration agreement or choice of forum clause. *See, e.g. Adams v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 888 F.2d 696, 700-01 (10th Cir. 1989). There must be some factual showing that the arbitration clause was oppressive, unreasonable, unjust, or inconvenient, or that the clause was induced by fraud, undue influence, or overweening bargaining power. *Cf. The Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 12, 15, 18 (1972). Here, the Fifth Circuit joined other circuits in holding that agreements to arbitrate in the securities industry are not unconscionable as a matter of law. (App. at 22.); *ee, e.g., Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988). Therefore, Dillard could not avoid arbitration; he failed to show that the arbitration clauses were unfair or oppressive under the facts of this case. (App. at 22.)

The Fifth Circuit was also correct in affirming the district court's disposition of Dillard's motion for declaratory and permanent injunctive relief. Requests for such relief must be made in a plaintiff's complaint. Fed. R. Civ. P 8(a). Because Dillard did not assert such causes of action in his complaint, he could not assert them for the first time in a motion. Thus, the court properly denied the relief Dillard requested in the motion.

Dillard's complaint about the district court's refusal to issue findings of fact and conclusions of law in the 1985 case is also without merit. Because there was no motion for an interlocutory injunction or non-jury trial on the facts, Fed. R. Civ. P. 52(a) simply does not apply.

Dillard's complaint in the 1985 Case about the availability of a private right of action under section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1988), is a non-issue. The district court dismissed the

1985 Case without prejudice and sent all claims to arbitration. The district court did not rule on the existence of a section 17(a) cause of action. The viability of a private right of action under section 17(a) is simply not at issue in this case.

As to the 1988 case, Merrill Lynch cannot discern what Dillard is complaining about. Because the Fifth Circuit remanded the 1988 Case to be adjudicated on the merits, Dillard won the appeal of that case as to Merrill Lynch and may proceed to litigate the case in the trial court.

To the extent Dillard complains of the factual recitation in the Fifth Circuit opinion, he does not specify what he claims is factually incorrect. In any event, the statement of facts in the Fifth Circuit's opinion is supported by the record, and it is certainly not the task of the Court to edit appellate opinions. *See Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court, however, reviews judgments, not statements in opinions").[3]

CONCLUSION

Dillard's petition for writ of certiorari should be denied.

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[3] The petition should also be denied because it was not timely filed. The Fifth Circuit's opinion in this case was issued on May 15, 1992. On August 13, 1992, the last day of the ninety day period for filing, the Clerk of this Court rejected a petition filed by Dillard because it was in improper form and the appendix was incomplete. More than three months later, sometime after November 14, 1992, Dillard filed a revised petition. Merrill Lynch submits that the revised version was not a "promptly substituted" revision allowed by Rule 33.7.

Respectfully submitted,

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